

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

MAY 20, 1998

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Anders Lowe, Inc.**

Serial No. 74/**672,694**

David Weiser of Lilling & Cohen LLP for **Anders Lowe, Inc.**

Christine Baker, Trademark Examining Attorney, Law Office 106
(**Mary I. Sparrow**, Managing Attorney).

Before **Hohein**, **Hairston** and **Walters**, Administrative Trademark
Judges.

Opinion by **Hohein**, Administrative Trademark Judge:

Anders Lowe, Inc. has filed an application to register the term "LIPSTIX" for "lipstick".¹ Applicant concedes that such term is the phonetic equivalent of the generic word "lipsticks" as evidenced by its voluntary disclaimer of the word "lipsticks".

Registration has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the basis that, when used in connection with applicant's goods, the term "LIPSTIX" is merely descriptive of them. Specifically, the Examining Attorney maintains that the sound created by the letter

¹ Ser. No. 74/672,694, filed on May 11, 1995, which alleges dates of first use of February 1992.

"'x' is so frequently substituted for [the combinations] 'ck' and 'cks' that the commercial impression, connotation and meaning of 'LIPSTIX' cannot be interpreted as something other than the generic name for applicant's goods and[,] thus, would be perceived as descriptive of the [applicant's] goods."

In support of her position that there is nothing novel or unique about applicant's use of the letter "X" as the phonetic equivalent of the letter combinations "CK" and "CKS," the Examining Attorney relies upon copies of 15 third-party registrations of marks containing the term "STIX" for goods identified as various kinds of sticks or sold in stick form and for which such term is either disclaimed or the mark is registered on the Supplemental Register. The Examining Attorney also supports her position by citing a dictionary definition, which we judicially notice,² of the word "lipstick" from Webster's II New College Dictionary (2d ed. 1995) at 639 in which such term is listed as a noun meaning a "small stick of waxy or pastelike lip coloring usually enclosed in a cylindrical case."

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

As stated by the Board in *In re State Chemical Manufacturing Co.*, 225 USPQ 687, 689 (TTAB 1985):

² The Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

It is hornbook law that the use of a slight misspelling of a descriptive term which would be perceived by purchasers as the equivalent of the descriptive term is subject to the same proscription of Section 2(e)(1) as the descriptive term itself. E.g., Standard Paint Co. v. Trinidad Asphalt Co., 220 U.S. 446, 455 (1911) [RUBEROID, misspelling of "rubberoid" for roofing material]; Miller Brewing Co. v. Joseph Schlitz Brewing Co., 605 F.2d 990, 203 USPQ 642, 643 (7th Cir. 1979) [LITE, misspelling of "light" for low calorie beer]; Fleetwood Co. v. Sylvia Mende, 298 F.2d 797, 132 USPQ 458 (CCPA 1962) [TINTZ, misspelling of "tints" for hair coloring formula]; American Druggists' Syndicate v. United States Industrial Alcohol Co., 2 F.2d 942, 55 App. D.C. 140 (1924) [ALKOL, misspelling of "alcohol" for rubbing alcohol]; A&H Transp. Inc. v. Save Way Stations, Inc., 214 Md. 325, 115 USPQ 251 (1957) [SAVON GAS, equivalent of "save on gas" for gasoline filling station services]; 1 McCarthy, TRADEMARKS AND UNFAIR COMPETITION, §11:12 (2d ed. 1984).

Applicant, while acknowledging in its brief that "admittedly the term lipstick is a generic word" for its goods, argues that "it does not necessarily follow that a phonetic variation can not be registered." In particular, relying principally upon *In re Grand Metropolitan Foodservice Inc.*, 30 USPQ2d 1974 (TTAB 1994), in which the stylized mark "MuffFuns" for "baked mini muffins sold frozen or fresh" was held to project a dual meaning or suggestiveness of muffins which are also fun to eat, applicant contends that the term "LIPSTIX" similarly has a different commercial impression or connotation from that conveyed by a misspelled generic or descriptive term alone.

In this regard, applicant argues that it "has not submitted a mere misspelling of a phonetic equivalent." Instead, applicant asserts--for the first time in its brief and notably

without any evidentiary support in the record--that, due to the manner in which it uses the term "LIPSTIX":³

Applicant is telling its customers that its product "sticks" on for a very long time. Had the Applicant simply submitted its mark without directing its customers to the characteristics and qualities of its goods, then [the] refusal to register may have been proper. This case is included within the principles as described [in] *In Re Grand Metropolitan Foodservice Inc.*, (*supra*). Applicant's customers are directly focused to the significance of the characteristics and qualities of its goods. That is, Applicant's lipstick really stays on for very long time. As described on the Applicant's packaging,

"This amazing orange-in-the-tube-lipstick changes color to enhance your natural skin tone and keeps lips from drying and chapping, **it really stays on! It's the only lipstick you'll ever need.**"

"To reorder call 1-800-Lipstix"

The Applicant in the case at bar is alerting its consumers to the quality and characteristic of the long lasting sticking ability of Applicant's lipstick, just as Grand Metropolitan alerted its customers that their muffins are fun. See *In Re Grand Metropolitan Foodservice inc.*, (*supra*). (Registration allowed for the phonetic misspelling [of] muffin as "muffuns"). Just as in *Grand Metropolitan*, Applicant herein is using its mark for the purpose of directly focusing consumers to the qualities and characteristics of its goods, to wit, that the product sticks on a person's lips for a very long time.

³ The specimens of record show only the following use of the term "LIPSTIX":

We agree with the Examining Attorney, however, that the purchasing public "is unlikely to attribute any meaning to the proposed mark other than the dictionary definition of a generic word," namely: lipsticks. Unlike the readily apparent double entendre projected by the mark "MufFuns" in *In re Grand Metropolitan Foodservice Inc.*, supra at 1975, there is nothing in the record which suggests, nor does common experience indicate, that buyers of lipsticks attach any importance or significance to how well such a product "sticks" to their lips. To be sure, some purchasers may care whether a lipstick is long-lasting, in the sense that it tends not to wear off, but wearers of lipstick simply do not regard such a characteristic in terms of how well the product "sticks on a persons lips".

Instead, as demonstrated by the evidence relied upon by the Examining Attorney and applicant's disclaimer of the word "lipsticks," the term "LIPSTIX" is merely a slight misspelling, and the phonetic equivalent, of the generic term "lipsticks," which are the goods in connection with which applicant uses the term it seeks to register. Accordingly, and in light of the policy considerations expressed in *In re State Chemical Manufacturing Co.*, supra at 689-90, for prohibiting registration of such a term in the absence of a possible showing of acquired distinctiveness pursuant to Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), the term "LIPSTIX" is at least merely descriptive of "lipstick". See, e.g., *Sebastian International Inc. v. Hask Toiletries Inc.*, 12 USPQ2d 2008, 2011 (TTAB 1989) [term "SHPRITZ" held phonetic equivalent of the generic term

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"SPRITZ" and hence unregistrable on the Principal Register for "hair spray"].

Decision: The refusal under Section 2(e)(1) is affirmed.

G. D. Hohein

P. T. Hairston

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board